Nos. 311-312

IN THE

Supreme Court of the United States

October Term, 1948

JOSEPH McGOWAN, *Petitioner,*

—v.—

J. H. WINCHESTER & CO., INC., *Respondent.*

PASQUALE BURO, *Petitioner,*

—v.—

AMERICAN PETROLEUM TRANSPORT CORP., *Respondent,*

—v.—

GEORGE R. TOLLEFSEN & M. A. TOLLEFSEN, copartners, doing business as TOLLEFSEN BROTHERS, *Respondent.*

BRIEF ON BEHALF OF PETITIONERS PASQUALE BURO AND JOSEPH McGOWAN, ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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With him on the Brief.

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Summary Statement of the Matter Involved

The petitioner, Pasquale Buro, seeks to review a judgment by the United States Circuit Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Eastern District of New York which judgment dismissed his action against American Petroleum Transport Corp., on motion before trial, which judgment of the United States Circuit Court of Appeals for the Second Circuit was entered on the 23rd day of July, 1948, and the petitioner, Joseph McGowan seeks to review a judgment by the United States Circuit Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Southern District of New York which set aside a jury's verdict in favor of petitioner and dismissing his complaint against J. H. Winchester & Co. Inc., entered in the Office of the Clerk on the 30th day of July, 1947.

The decision of the United States Circuit Court sought to be reviewed adopts the view that this Court by its decision in *Caldarola* v. *Thor Eckert & Co.*, 332 U. S. 155, has granted complete immunity to ship operators from liability for their own torts committed aboard a vessel, solely on the basis that such ship operator was acting under a general agency agreement with the War Shipping Administration.

It seems that the Court below did not read the decision of the *Caldarola* case, *supra,* correctly. We feel the decision clearly states that insofar as the action was predicated solely on the law of the State of New York (which required proof of complete and exclusive control by the agent; see *Cullings* v. *Goetz,* 256 N. Y. 287), and such proof was not produced, that Caldarola had failed to sustain his burden of proof and this Court was impelled to affirm the Court

of Appeals of the State of New York in its interpretation of the State law. Quite a different principle of law applies, however, if the action is predicated, not on the law of the State of New York but on general maritime law which does not require the same proof of control as required by said State law, but only "a substantial measure of control over the operation of the vessel." *Quinn* v. *Southgate Nelson Corp.*, 121 F. (2d) 190, 191, cert. den. 314 U. S. 682.

Statement of the Case

It is submitted that the United States Supreme Court in its decision in the *Caldarola* case, *supra,* never intended to and actually did not grant immunity from suit for tort damages to steamship companies acting under the so-called general agency agreement with the United States.

The holding by the Court below was in substance a decision to the effect that a general agent is immune from suit under any and all circumstances for damages resulting from a tort aboard a vessel.

A casual glance at the *Caldarola* decision might give rise to the impression that the Supreme Court arrived at a different conclusion in said case than it did in the case of *Brady* v. *Roosevelt Shipping Corporation,* 128 Fed. (2nd) 196; 317 U. S. 575. However, one must read the decision, as well as review the record on appeal, in order to actually understand that the decision in the said *Caldarola* case is merely a restatement of the law, as laid down in the *Brady* case.

In the *Brady* case, *supra,* the Supreme Court held that a contract *inter se,* between the steamship company as agent, and the United States of America as owner, was not binding on an injured third person.

In the *Caldarola* case, *supra,* the same principle of law was repeated that a contract *inter se* between the steam-

ship company as agent, and the United States of America as owner, was not the basis, in and of itself, for a law suit by an injured third person.

Looking at both decisions in a practical sense, one cannot escape the fundamental principle laid down by this Court in both cases, viz., that a contract *inter se* between the steamship company, as agent, and the United States of America, as owner, does not, in and of itself, either create or eliminate liability on the part of either the agent or the owner of the vessel to a third person for a maritime tort.

This Court has stated that the contract, in and of itself, does not create any liability or impose any duties on the part of the general agent towards a third party, but by the same token, there is nothing in the decision which supports the contention that the contract may be used by a general agent as blanket immunity for his own torts or his violation of duty to his invited guest.

The Facts

The facts can best be expressed by quoting from the opinion by the United States Circuit Court of Appeals for the Second Circuit, dated June 24, 1948, in the cases of *Joseph McGowan* v. *J. H. Winchester & Co. Inc.* and *Pasquale Buro* v. *American Petroleum Transport Corp.*, not officially reported as yet, unofficially reported in 1948 A. M. C. 1133, in the following language, quoting from page 1134:

> Both plaintiffs were employees of contractors engaged on behalf of the United States to repair vessels owned and operated by the Government. The defendants, by virtue of contracts with the United States acting by and through the War Shipping Administration, were the general agents for the vessels involved.

McGowan, a rigger employed by the Seaboard Marine Repair Co., Inc., was engaged in operating a winch on the S. S. *William A. Graham,* while Buro was a scaler employed by Tollefsen Brothers aboard the S. S. *William Penn.* The injury to McGowan occurred in the course of his work aboard the *Graham* when, as a result of negligence on the part of the ship's crew, a metal shackle attached to a gantline struck him, causing the injury of which he complains. Buro, on the other hand, was injured as a consequence of the negligence of the *Penn's* owner in failing to fit a proper platform at the point where the ladder from a manhole on deck ended in the curved top of a shaft alley. It appears that he was descending into a tank when he slipped and fell because of this described negligence.

POINT I

A steamship company which in fact is in possession and control of a vessel is liable for negligence on the basis of its actual conduct and performance and not relieved of responsibility by a contract with the Government, the terms of which are inconsistent with the existing facts.

The law is well settled that a contract *inter se* between a steamship company and the Government is not binding on a third party. *Brady* v. *Roosevelt Shipping Corp.,* 128 Fed. (2d) 169, 317 U. S. 575; *Quinn* v. *Southgate Nelson Corp.,* 121 Fed. (2d) 190, cert. den. 314 U. S. 682. These decisions have not been reversed or modified. The United States Supreme Court has held that the service agreement for vessels, of which the War Shipping Administration is owner or owner *pro hac vice,* generally referred to as the general agency agreement, may not be used as the basis

for holding the agent liable for nonfeasance (except by members of the crew). *Caldarola* v. *Thor Eckert & Co.*, 332 U. S. 155. This, however, in no wise modifies or reverses the uniform holdings by all of our Courts, both federal and state, that an agent, who in fact is in possession and control, is liable for negligence. See *Brady* v. *Roosevelt, Quinn* v. *Southgate, supra.*

A contract *inter se,* between principal and agent, in and of itself neither creates nor eliminates liability on the part of either to third persons. The controlling factor is the course of conduct. It is not the terms of the agreement that are material, relevant or competent, as the terms of the agreement may or may not have been performed or complied with. As was stated in the *Caldarola* case, *supra,* at page 158: "the narrow question is whether the Agents were in possession and control * * * This is the crucial issue * * *" The Court went on to say at page 159: "The United States as *amicus curiae* submitted what we deem to be conclusive considerations against reading the contract so as to find the Agents to be owners *pro hac vice* in possession and control of the vessel" (as to those other than seamen). The Court stressed the consequences of such an interpretation of the contract.

We submit that the answer to the "narrow question" as to whether the agents were in possession and control is to be found in the factual situation, as it existed with respect to the vessel. The answer is not to be found within the four corners of a written document, drawn before the accident, the terms of which may or may not have been performed.

The *Caldarola* case dealt solely with the contract as the basis of liability without any factual evidence as to what, if anything, the agents actually did in the performance of the contract, in whole or in part, and in conformity with or violation of its terms. In the *Caldarola* case there was no proof that the agent was in possession and control of

the vessel at the time of the accident. As a matter of fact the evidence disclosed that it was the Moore-McCormack Lines, if anyone, which was acting as general agent at the time. There was further evidence that Caldarola's employer, The Jarka Corporation, was acting under a separate agreement as an independent contractor for the United States. There was no proof that the general agent hired The Jarka Corporation, but the proof was to the contrary, that a third party, viz., Moore-McCormack Steamship Co., hired The Jarka Corporation on behalf of the United States as an independent contractor.

The evidence in the *Caldarola* case, at page 114 of the record filed in the New York Supreme Court, Appellate Division, First Department, with reference to the testimony of Harold Winsch, manager of Thor Eckert & Co. was as follows:

> "Q. Mr. Winsch, on January 27, 1944, the day of this accident, who, if you know, was servicing the vessel Everagra as agent, either general agent or berth agent? A. Well, as general agent, we, Thor Eckert & Company, acted in behalf of the War Shipping Administration, and as the berth agent, the War Shipping Administration assigned the vessel to Moore-McCormack, Incorporated, 5 Broadway, New York.
>
> "Q. *Did your company have anything to do with the stevedoring of the vessel at this time?* A. *No, sir.*
>
> "Q. *Who handled that matter?* A. *Moore-McCormack as berth agent instructed and authorized to handle such matters.*
>
> "Q. Are they agents of the War Shipping Administration too? A. Yes, sir.
>
> "Q. Was the vessel on January 27, 1944, at one of the piers owned or controlled by you? A. No, sir" (fols. 341, 342, 343). (Italics mine.)

Nicholas J. Poliknick, the operating manager of the Jarka Corporation, testified as follows, at page 235:

"Q. Does the Jarka Corporation do the stevedoring at Pier 34? A. Yes, sir.

"Q. And who has that pier? A. The Agwi Line.

"Q. And you are regular stevedores for them? A. At 34, yes, sir" (fol. 704).

* * * * *

"Q. Very good. And your men, that is, the men employed by you to do this work, came on board the Everagra pursuant to this contract with the United States, is that correct? A. That is correct" (fol. 705). (The words "this contract" refer to Deft. Ex. T—Contract between War Shipping Administration and Jarka Corporation (fol. 1095).)

Mr. O'Rourke, Superintendent of Terminals for the Moore-McCormack Lines testified as follows, at page 236:

"Q. Now, did your company act as berth agents with respect to the Steamship Everagra on January 27, 1944? A. Yes, sir.

"Q. And what did you do in that respect? A. We made arrangements with the Agwi Lines to berth the vessel at Agwi Pier 34 for the purpose of discharging the cargo" (fols. 708, 709).

He also testified as follows, at page 237:

"Q. Mr. O'Rourke, did your company make the arrangements with the Jarka Company for doing the stevedoring or did you instruct the Agwi Lines to do it for you? A. We instructed the Agwi Lines, inas-

much as the Jarka Corporation did all the work on that particular pier" (fol. 711).

It might be in point to mention the fact that in the said *Caldarola* case, the Moore-McCormack Lines, although named in the original action, was never served with process and was not a party to the action (fol. 3).

The United States Supreme Court in the case of *Seas Shipping Co. Inc.* v. *Sieracki*, 66 S. Ct. 872, 328 U. S. 85 held that a ship operator could not escape his traditional responsibility by converting the ancient liability for maritime tort into a purely contractual responsibility. Although in the *Seas Shipping Co. Inc.* case, *supra*, the Court was dealing with a ship owner's responsibility, the point sought to be made is that no one, ship owner, ship operator, or charterer, may, by contract, evade responsibility for its own torts on a vessel under its substantial control. The Court at page 97 set forth the following:

"And so an injury to a stevedore comes within the classification of a marine tort. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52. It seems therefore that when a man is performing a function essential to maritime service on board a ship, the fortuitous circumstances of his employment by the shipowner or a stevedoring contractor should not determine the measure of his rights. This is the very basis on which the Jones Act was held applicable to give redress to an injured employee in *International Stevedoring Company* v. *Haverty*, 149 Fed. 2nd 98, 101. • • • •"

In the *Quinn* case, *supra*, at page 191, the Court held as follows:

"Common sense and the precedents make appellant liable on the facts of this case. It had a most substantial measure of control over the operation of the vessel; it was paid to 'manage, operate and conduct the business of the line'. The reserved powers of the owner could not possibly have been so burdensome as to deprive appellant of *de facto* control, and there is no showing that in fact the owner did substitute itself as manager, either generally or at the time of the accident. Even if the Maritime Commission selected the officers, as appellant contends, appellant was not ousted of control." (121 Fed. (2d) 190, at p. 191.)

The point sought to be emphasized is that our courts, in determining the liability of agents, look to the factual situations and are not concluded in their determinations by the terms of the contracts.

That a principal is liable for a wrong does not necessarily absolve his agent from liability.

Blumenthal & Co. v. *U. S.*, 30 Fed. (2d) 247;
Sloan Shipyards v. *U. S. Fleet Corp.*, 258 U. S. 549.

In many cases dual liabilities are not alternatives or mutually exclusive.

In the *Brady* case, *supra*, the Supreme Court said, at page 583:

"Moreover, if petitioner had a cause of action against respondent, it is difficult to see how she could be deprived of it by reason of a contract between respondent and the Commission. Immunity from suit on a cause of action which the law creates cannot be so

readily obtained. Cf. *Guaranty Trust & S. D. Co.* v. *Green Cove R. Co.*, 139 U. S. 137, 143. *The rights of principal and agent inter se are not the measure of the rights of third persons against either of them for their torts.*" (Italics mine.)

So, too, in *Sloan Shipyards* v. *U. S. Fleet Corp.*, *supra*, at pp. 566, 567:

"• • • the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man we doubt if anyone would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts. *Osborn* v. *Bank of United States*, 9 Wheat. 738, 842, 843; *United States* v. *Lee*, 106 U. S. 196, 213, 221."

In the *Brady* case, *supra*, again the Supreme Court said at pp. 580, 581:

"We may also assume that it (Congress) would have the power to grant immunity to private operators of government vessels for their torts. But such a basic change in one of the fundamentals of the law of agency should hardly be left to conjecture."

Where the evidence establishes the fact that the agent is actually in substantial possession and control of the vessel, there is no justification for permitting such agent to escape legal responsibility by reason of a contract with a third person, to which agreement the injured person was not a party.

POINT II

The *Caldarola* decision has not granted to an invitor immunity from all liability for violation of his duties to his business invitee, or guest.

It is not contended that a plaintiff may recover in a tort action without sustaining his burden of proof. Caldarola failed to sustain his burden of proof as to operation and control. The contract offered in evidence, in and of itself, was not a substitute for proof of possession and control by the agent. There was no other evidence offered on this question of possession and control.

Caldarola did not base any liability on any other violation of duty to him on the part of Thor Eckert & Co. There was absolutely no testimony submitted that Caldarola in fact had been invited aboard the vessel by Thor Eckert & Co. There was no proof that Thor Eckert & Co. owed any duty whatsoever to Caldarola for his safety aboard the ship. Naturally, there being no duty, in the nature of things, there could be no breach.

As pointed out under Point I, actually Caldarola was invited aboard the vessel by his employer, the Jarka Corporation, which had a contract directly with the United States, do the stevedoring work. The Jarka Corporation acted under the general directions of Moore-McCormack Lines which were the berth agents and which, as berth

agents, instructed and authorized Jarka to handle the stevedoring work. This was done under an arrangement with the Agwi Lines to berth the vessel at Agwi Pier 34, for the purpose of discharging the cargo.

The testimony showing this situation is to be found under Point I.

Perhaps a valid contention might have been made that the Jarka Corporation, the United States of America through its War Shipping Administration, the Agwi Lines or the Moore-McCormack Lines, jointly or severally, invited Caldarola aboard the vessel, but there is definitely no support for any contention that Thor Eckert & Co. invited, authorized, or even had knowledge of Caldarola's presence on board the vessel.

There was no proof of any duty owed or violated by Thor Eckert & Co. to Caldarola. In the cases at bar plaintiffs were business invitees of the respective defendants, which owed them the duty of reasonable safety while aboard the vessel. The invitors cannot be heard to say that they were not liable for injuring the plaintiffs or causing them to be injured after inviting the plaintiffs aboard unsafe premises, or unduly exposing them to hazards.

The agent is the one who has knowledge as to persons who will come aboard and who undertakes to keep the vessel and its equipment in safe condition for their use. The agent is the only one constantly on board to observe the creation of hazardous risks in the vessel's daily routines and to control them.

The law is well settled that even a volunteer who in the first instance is under no obligation to provide a reasonably safe place to a third person, if he gratuitously undertakes to act, is duty-bound to do so in such a manner as not

to injure or create a dangerous condition which might injure such invitee.

Marks v. *Nambil Realty Co.*, 245 N. Y. 256.

It was the defendants herein, the general agents and not the owner, which invited the plaintiffs aboard the vessel. It was the general agent which owed its invited guest the duty to take reasonable precautions for such invitee's safety, irrespective of any contractual or other relationship. The plaintiffs herein, as the business invitees or guests of the defendants herein, were entitled to assume and to expect that the invitors had taken reasonable precautions for such invitees' safety.

The Circuit Court of Appeals for the Second Circuit said in *Puleo* v. *Moss & Co.*, 159 Fed. 2nd 842 at p. 845, cert. den. June 16, 1947,

> "* * * So far as touches the liability, the New York Court of Appeals has applied the same doctrine to a ship as to premises on land, and it follows that the Moss Company owed to Puleo the same duty which it would have owed to him had he entered its factory or shop to do repairs. As the employee of a contractor who had undertaken such work, he was an 'invited person', or as they are now called a 'business guest', and in New York the measure of care appears to be the same as that due from an employer to his employee. It is doubtful in any event whether there is any but a difference in form between the duties to a 'business guest' and an employee; but, that aside, the New York courts have accepted the form in which the duty to a 'business guest' is stated by the Restatement of Torts (sec. 343), and, indeed, there have been no

substantial variants anywhere in the doctrine since the outset. It demands that the owner shall at least tell the 'guest' of any dangers known to him, and not to the 'guest'.

Aurigemma v. *Nippon Yusen Kaisha*, 238 N. Y. 183;
Casey v. *Lehigh Valley R. R. Co.*, 128 App. Div. 86;
Lymans v. *Putnam Coal & Ice Co.*, 182 App. Div. 705;
Hess v. *Bernheimer & Schwartz Brewing Co.*, 219 N. Y. 415, 418;
Dougherty v. *Pratt Institute*, 244 N. Y. 111, 113;
Haefeli v. *Woodrich Engineering Co.*, 255 N. Y. 442, 448, 451;
Potter v. *New York O. & W. Ry. Co.*, 261 N. Y. 489, 493;
Petluck v. *McGolrick Realty Co.*, 240 App. Div. 61;
Greenfield v. *Hospital Association*, 258 App. Div. 352."

See also:

Grillo v. *Royal Norwegian Government*, 1943 A. M. C. 1357, 139 F. (2d) 237, 238 (2 C. C. A.);
Pioneer S.S. Co. v. *McCann*, 170 Fed. 873 (6 C. C. A.);
Glover v. *Compagnie Generale Transatlantique*, 1939 A. M. C. 695, 103 F. (2d) 557, 559 (5 C. C. A.), cert. den. 308 U. S. 550.

In the *McGowan* case, the fact that the plaintiff was a business invitee of the defendant was never denied by the

defendant and was affirmatively established by Defendant's Exhibit A, which was a contract between plaintiff's employer, Seaboard Marine Repair Co., Inc., and this defendant, dated July 7, 1945, under the terms of which plaintiff's employer, as well as plaintiff, came aboard the vessel on the day of the accident.

In the *Buro* case it was alleged in the complaint that the plaintiff was rightfully and lawfully aboard the vessel in the course and conduct of his business. It was further alleged that the defendant failed and neglected to use reasonable and proper precautions to protect persons rightfully and lawfully aboard the vessel, and that George R. Tollefsen, doing business as Tollefsen Bros., was Buro's employer.

POINT III

In the *McGowan* case, the trial court committed error in setting aside the jury's verdict on a controverted factual issue, amply supported by evidence.

As distinguished from the proof in the *Caldarola* case *supra,* the plaintiff McGowan did not rely on the contract as a substitute for evidence, but submitted proof which supports the jury's finding that the agent was in actual possession and control at the time of the accident.

The question of operation and control was a factual issue as to substantive law and not subject to a motion addressed to the discretion of the trial court.

A trial court has no authority to set aside a jury's verdict on a controverted issue of fact, supported by the testimony.

In *Hust* v. *Moore-McCormack Lines* (Oregon Supreme Court), 176 Ore. 662, 158 P. (2d) 275, the Court stated as follows:

"In cases arising under federal acts, however, the Supreme Court, as we have seen, decides this question (whether a given question is one of substance or procedure—insert mine) for itself, and state courts are bound by its rulings * * * *But the federal courts, as we have seen, hold that questions pertaining to the sufficiency of the evidence and the right of the court to determine the issue as a matter of law to be substantive"* (italics mine).

The action having been predicated upon a maritime tort, the question of weight of evidence then becomes one of substantive right to be determined only by a jury and not reviewable by a Trial Court. In dealing with a substantive right the sole function of the Court is to supply the remedy of Section 9 of the Judiciary Act. *Testa* v. *Katt,* 330 U. S. 386.

Pariser v. *City of New York,* 146 Fed. (2d) 431;
Southern Ry. Co. v. *Bennett,* 233 U. S. 80;
Herencia v. *Guzman,* 219 U. S. 44;
Swift & Co v. *Ellinor,* 101 Fed. (2d) 131;
Metropolitan St. Ry. Co. v. *Jacobi,* 112 F. 924.

As early as 1830, in the case of *Parsons* v. *Bedford,* 3 Pet. 433, 1830, 28 U. S. 433, the Court laid down a principle of law which has consistently been followed by all the Courts of this country, and which principle was reiterated in the case of *Slocum* v. *New York Life Ins. Co.,* 228 U. S. 364, wherein the Court stated on page 378 as follows:

"The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."

Said Court further stated, on page 378, quoting from the case of *Walker* v. *New Mexico &c. Railroad Co.*, 165 U. S. 593:

> "This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."

In the case of *Johnson* v. *Dierke Lumber & Coal Co.*, 130 Fed. (2d) 115, the Court stated on page 119:

> "Moreover, where reasonable men may draw different inferences from the evidence, it is the province of the jury to determine which is proper."

See also:

Goldstein v. *Pullman*, 220 N. Y. 549;
Tantillo v. *Goldstein Bros. Amusement Co.*, 248 N. Y. 286;
McNally v. *Oakwood*, 210 App. Div. 612, aff'd 240 N. Y. 600.

The United States Supreme Court has uniformly held that findings on conflicting testimony by a trial jury who saw the witnesses, so long as there is any testimony consistent with such findings, must be treated as unassailable.

So was it held in another United States Supreme Court decision, *Davis* v. *Schwartz*, 155 U. S. 631, where the Court upheld the finding of fact as follows:

> "• • • so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must

be treated as unassailable • • • as there is nothing to show that the findings of fact were unsupported by the evidence, we think they must be treated as conclusive" (pages 636, 637).

In the case of *Howard* v. *Louisiana & A Ry. Co.*, 49 Fed. (2d) 571, the Court stated on page 574:

"This state of the evidence requires that the issues of fact raised upon conflicting testimony 'shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative'."

In the case of *Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521, the Court stated on page 524:

"The credibility of witnesses, the weight and probative value of evidence, are to be determined by the jury and not by the judge."

In a maritime tort the question of *weight of evidence*, decided by a jury is *final.*

See:

Hust v. *Moore-McCormack Lines, supra;*
Howard v. *Louisiana & A Ry. Co., supra;*
Pariser v. *City of New York, supra;*
Southern Ry. Co. v. *Bennett, supra;*
Herencia v. *Guzman, supra;*
Swift & Co. v. *Ellinor, supra;*
Metropolitan St. Ry. Co. v. *Jacobi, supra;*
Baltimore & Ohio R. R. Co. v. *Groeger*, 266 U. S. 521;

Barlow v. *Pan Atlantic S. S. Corp., et al.*, 101 F. (2) 697;
United States v. *United Shoe Machine Company*, 247 U. S. 32;
Davis v. *Schwartz, supra;*
Norfolk Tidewater Terminal Inc. v. *Wood Towing*, 94 F. (2) 164;
Minneapolis & St. Louis R. R. Co. v. *Winters*, 242 U. S. 353;
Walker v. *New Mexico & Railroad Co.*, 165 U. S. 593;
Parsons v. *Bedford, supra;*
Slocum v. *N. Y. Life Ins. Co., supra;*
Johnson v. *Dierke Lumber & Coal Co., supra;*
Goldstein v. *Pullman, supra;*
Tantillo v. *Goldstein Bros. Amusement Co., supra;*
McNally v. *Oakwood, supra;*
Fairmount Glass Works v. *Cab Fork Coal Co.*, 287 U. S. 474, 481, 485.

Of course the record in its entirety clearly shows that there was ample evidence to support the jury's finding and this court will not be burdened with a detailed review of the testimony in this brief. However, it might be in place to point out a few of the facts which support the jury's finding that the defendant herein was actually in possession and control of the vessel.

The testimony of Henry R. Cox, marine superintendent for the defendant, J. H. Winchester & Co. Inc., was to the following effect:

1. Defendant selected and engaged the master.

"Q. Who engaged him? Did you engage Captain Ransom for this vessel? A. Winchester & Company

on behalf of the United States Maritime Commission and War Shipping Administration, under authority granted in its general agency agreement, engaged a master for this vessel (fol. 250).*

* * * * *

Q. Did you personally select the master? A. It is quite probable that I did.

Q. And then he became the master of this vessel; is that so? A. Yes, sir" (fol. 251).

2. The defendant selected and engaged the officers of the vessel.

"Q. Now, how were the officers of the vessel selected? A. The officers were made available to the master of the vessel by intervention of our office in the form of a telephone notice to the labor organization with whom a collective bargaining agreement existed, that there were vacancies to be filled.

Q. So that J. H. Winchester & Company, through yourself, arranged to obtain these officers for this vessel; is that so? A. Those officers were made available to the master in that fashion" (fols. 251, 252).

3. The defendant obtained and engaged the crew for the vessel.

"Q. Now, how was the crew obtained for this vessel? A. On notice from the master that vacancies existed in the manning of the ship, a similar procedure followed. The union with whom a collective bargaining agreement existed was notified, and they dispatched

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* Folio numbers refer to Transcript of Record in the Circuit Court of Appeals. Record for this Court not received from U. S. Government Printing Office.

from their union hall such men as were required to fill such vacancies.

Q. Who took care of that? Did J. H. Winchester & Company take care of that? A. We are sort of a pipeline in making the necessary telephoning.

Q. J. H. Winchester & Company did that? A. That's right.

Q. Did you do it for Winchester, or is there someone else? A. It may have been myself or it may have been one of my assistants" (fols. 252, 253).

4. The defendant paid the captain, officers and crew of the vessel.

"Q. Who paid the captain, officers and crew of this vessel? A. Paid by the United States War Shipping Administration.

Q. Who physically paid them? A. J. H. Winchester.

• • • • •

Q. But the actual turning over of the moneys was done by J. H. Winchester & Company? A. That is correct" (fol. 254).

5. The defendant made deductions for social security and withholding taxes and other necessary deductions.

"Q. Did they make deductions for Social Security and withholding taxes, J. H. Winchester & Company, for these various officers and crew that they paid? A. We are getting a little confused, I am afraid. J. H. Winchester & Company, as an agent for the U. S. Maritime Commission, War Shipping Administration, paid physically these men and made such deductions as were required to be made under existing laws.

Q. They deducted the social security? A. That was one of the things.

Q. Did they also deduct for unemployment insurance and for withholding income taxes? A. The withholding tax was deducted. As to the unemployment insurance, that is a question I am not too sure about, because social security and unemployment insurance, in my mind, is so inextricably confused.

Q. They made the necessary deductions; is that right? A. That is correct" (fols. 255-256).

6. The defendant entered into collective bargaining agreement with the union for the officers and seamen.

"Q. Now, how was the crew obtained for this vessel? A. On notice from the master that vacancies existed in the manning of the ship, a similar procedure followed. The union with whom a collective bargaining agreement existed was notified, and they dispatched from their union hall such men as were required to fill such vacancies" (fols. 252, 253).

7. The defendant made inspections and obtained information with respect to the state of repair and condition of the vessel.

"Q. Who on behalf of J. H. Winchester & Company made inspections and obtained information with respect to the state of the repair and condition of the vessel pursuant to Article 14 of this agreement? A. Upon any notice given to the office of J. H. Winchester & Company by the master of the vessel that there was something in a state that needed repair, or other condition, the superintending engineer of J. H. Winchester & Company started the wheels in motion to cause such repairs as were indicated to be undertaken" (fols. 258, 259).

8. The defendant by its representatives boarded the vessel upon its arrival.

"Q. When the vessel arrives in port does one of the representatives of J. H. Winchester & Company go aboard the vessel? A. Customarily, yes.

Q. Who would that be? A. It could be the marine superintendent; it could be the superintending engineer; it could be the port captain.

Q. What is the purpose of that representative of J. H. Winchester & Company going aboard? A. Contact the master with relation to the voyage he had just performed, transmit to him any orders which might be on the calendar for him to carry out, to ascertain the repair list which he would have prepared and have ready for submission, determine what he might require in the way of stores or equipment for his forthcoming voyage" (fols. 259, 260).

9. The defendant arranged to provide the stores and equipment for the next voyage.

"Q. Who would then provide the stores and equipment necessary for the next voyage? Did J. H. Winchester handle that? A. Winchester, under its agency, is required to provide the ship, yes" (fol. 260).

10. The defendant arranged for the necessary repairs for the vessel.

"Q. Who would arrange for the necessary repairs to the vessel? Would J. H. Winchester arrange for that? A. Yes, that is correct. That is another charge under the agreement, to maintain the vessel in repair" (fols. 260, 261).

11. Where the repairs were less than a certain amount, which might be $5,000.00, the defendant could make the repairs without any orders from the War Shipping Administration.

"Q. Mr. Cox, it has been brought out here that the William A. Graham was undergoing repairs at the pier in Edgewater, New Jersey, at the time this accident took place. Who would have ordered and started such repairs? A. Those orders would have emanated from the War Shipping Administration to Winchester.

Q. Were any repairs ever ordered directly by Winchester in their capacity as agents? I don't mean these, but maybe minor voyage repairs. A. Minor voyage repairs? They were at various times. The War Shipping Administration established scales within which the general agents might operate without reference to them on small voyage repairs.

Q. Was an amount set there? A. Yes. At various times that amount changed. It might be—well, let us say, for instance at one time it might have been $5,000, and perhaps at another time it might be a higher amount. It might, at different times, be lower" (fols. 269, 270, 271).

12. Instructions to the master as to where the ship was to go and what it was to do was given by the defendant.

"Q. Who would give instructions to the master as to where the ship was to go and what it was to do? A. Those instructions would emanate from the United States Maritime Commission, War Shipping Administration, to Winchester & Company, and then be passed on to the master.

Q. So that directly the instructions would come from Winchester, who would obtain them from the United States—

Mr. Hanrahan: I object to the way it is phrased.

The Court: There is no doubt in what he said. He said they came from the Maritime Commission to J. H. Winchester & Company, who would transmit it to the master.

Mr. Baker: I put it the other way.

The Court: It does not make any difference" (fols. 262, 263).

Further evidence that the defendant, J. H. Winchester & Co. Inc., were the operators of the vessel, is the agreement for the repair by the Seaboard Marine Repair Co. Inc. of this vessel dated July 7, 1945, which agreement was offered in evidence by defendant as defendant's exhibit A wherein the following appears:

"Name: S.S. 'William A. Graham'
Contract: #4400
Location: Archer Daniels, Edgewater
Operators: J. H. Winchester & Co.
Account: Operators"

POINT IV

In the *Buro* case, the District Court committed error in granting the defendant's motion for summary judgment before trial.

As distinguished from the *Caldarola* case, *supra,* wherein the plaintiff relied on the contract as a substitute for evidence, the plaintiff herein has alleged that the vessel aboard which he was injured was in actual control of the defendant at the time of the accident. The plaintiff has also alleged that he was a business guest or invitee aboard the vessel.

We will not burden the Court with extensive authority on the proposition that on defendant's motion for summary judgment, the allegations in plaintiff's pleadings are presumed to be true.

> *Rogers* v. *Girard Trust Co.*, 159 Fed. 2 239;
> *Weisser* v. *Mursam Shoe Corp.*, 127 Fed. 2 344.

The question of operation and control presented a factual issue as to substantive law which the plaintiff is entitled to have tried before a jury.

CONCLUSION

The Court below felt that it was bound to consider the General Agency Agreement as binding on the question of possession and control of the vessel, whereas the true test is the factual proof as to the acts performed by the defendant showing that said defendant did in truth and in fact exercise possession and control irrespective of the fact that the terms of the General Agency Agreement may not have called for such exercise of possession and control.

The *Caldarola* case merely held that the plaintiff's burden of proof is not met by offering in evidence the so-called General Agency Agreement, but the decision did not preclude a plaintiff from suing a defendant for its own tort or from establishing that irrespective of the contract, possession and control was actually exercised by the defendant.

Furthermore, the Court below totally disregarded the uniformly accepted law by all of our courts, both Federal and State, that an invitor owes his invitee a duty to protect him from harm while acting on the invitation.

The Court below further overlooked the fundamental rule of agency that the rights of principal and agent *inter se* are not the measure of the rights of third persons against either of them for their torts.

In the *McGowan* case there was evidence to support the finding of the jury that the agent was in actual possession and control at the time of the accident. The fact that such possession and control were in accordance with the general agency agreement, does not in and of itself preclude a third person, not a party to such agreement, from pursuing his remedy against the general agent.

Actual possession and control of the vessel by the general agent has been proven in the *McGowan* case and must be assumed as alleged in the *Buro* case.

The Court below erred in holding that the *Caldarola* case, *supra,* in effect granted immunity from suit to all steamship companies acting under a general agency agreement.

The Court below was in error when it held that upon performance by a steamship company of the terms of the general agency agreement it was immune from suit.

Wherefore, petitioners respectfully ask this Court to review the decision of the Court below.

Respectfully submitted,

JACOB RASSNER
Attorney for Petitioners.

NATHAN BAKER,
THOMAS O'ROURKE GALLAGHER,
With him on the Petition

JACK STEINMAN,
ROBERT KLONSKY,
With him on the Brief.

Nos. 311 - 312

IN THE

Supreme Court of the United States

October Term—1948

JOSEPH McGOWAN,

Petitioner,

—vs.—

J. H. WINCHESTER & CO., INC.,

Respondent.

PASQUALE BURO,

Petitioner,

—vs.—

AMERICAN PETROLEUM TRANSPORT CORP.,

Respondent,

—vs.—

GEORGE R. TOLLEFSEN & M. A. TOLLEFSEN, copartners, doing business as TOLLEFSEN BROTHERS,

Respondent.

PETITION FOR AN EXTENSION OF TIME *NUNC PRO TUNC* TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB RASSNER
Attorney for Petitioners

NATHAN BAKER
THOMAS O'ROURKE GALLAGHER
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With him on the Petition.

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PETITION FOR AN EXTENSION OF TIME *NUNC PRO TUNC* TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition herein was sent by registered mail on the 24th day of September, 1948, and docketed by the Clerk of

this Court on the 27th day of September, 1948, as Nos. 311 and 312, October Term, 1948. The opinion of the United States Circuit Court of Appeals for the Second Circuit is dated June 24th, 1948, and the judgment on mandate was entered in the *McGowan* case on the 30th day of July, 1948, and in the *Buro* case on the 23rd day of July, 1948.

The question sought to be reviewed is of such importance, not only to the parties involved herein, but to many other litigants, that perhaps it might be in place to respectfully ask this Court to exercise its discretion in extending the petitioners' time within which to petition for certiorari, ***nunc pro tunc,*** as if made prior to the expiration of time provided by statute. (Title 28, U. S. Code, Judiciary and Judicial Proceedure, Sec. 2101 (c), effective September 1, 1948.)

There would be no point in reviewing the question involved as the same has been fully presented in the brief which has been filed with the Clerk of this Court in support of the petition.

Counsel for petitioners interpreted Sec. 2101 (c) of the revised Judiciary Code, as changing the old rule, so that the time in which to file the petition for writ of certiorari would run from the date of the entry of judgment on mandate.

Counsel for respondents question the timeliness of the petition. To obviate any question as to whether the petition was filed in time, petitioners respectfully pray this Court to exercise its discretion and grant an extension of time to the petitioners so that the petition, already filed, would be deemed timely.

The revised Judiciary Code, Section 2101 (c), makes no provision that the relief for an extension of time must be made prior to the expiration of ninety (90) days.

We are mindful of the strict interpretation adopted by this Court as to the former provision of the Code (Sec. 8 of the Act of February 13, 1925). *Finn* v. *Railroad Commission,* 286 U. S. 559, 52 S. Ct. 646.

However, it is respectfully urged that in view of the importance of the question sought to be reviewed and the fact that the revised Judiciary Code may inadvertently have been interpreted incorrectly by us, that this Court adopt a liberal interpretation of the revised Judiciary Code. It may be in place to point out the fact that this Court has authority to grant such relief and it is respectfully submitted that in the exercise of sound judicial discretion, the relief sought herein should be granted.

The applicable provision as contained in Sec. 2101, Title 28 of the U. S. Code, reads as follows:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree unless, upon application for writ of certiorari, for good cause, the Supreme Court or a justice thereof allows an additional time not exceeding sixty days."

This revised section is based on Sec. 350, Title 28 of the U. S. Code (43 Stat. 940, Feb. 13, 1925, Chapter 229, Sec. 8, subd. (a)), which reads as follows:

> "Time for making application for writ of error, appeal, or certiorari; stay pending application for certiorari. No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application thereof be duly made within

three months after the entry of such judgment or decree, excepting that writs of certiorari to the Supreme Court of the Philippine Islands may be granted where application therefor is made within six months. For good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty days by a justice of the Supreme Court."

Historical analysis of the pre-existing section pertaining to time for certiorari reveals that Congress had no intent to require that applications to extend the time to file writs of certiorari be made before the expiration of the original three months period.

Prior to the enactment of 43 Stat. 940, February 13, 1925, the limitation on the time for making an application for a writ of certiorari was a period of three months *and the statute contained no clause then permitting Justices of the Court to extend time.*

Senate Bill No. 2060 in the 68th Congress—1st Session and House Bill No. 8206 were written at the request of Congress. (Report of the Committee on the Judiciary, U. S. Senate, 68th Congress—1st Session, Report No. 362, Congressional Document Series No. 8220.)

In dealing with Section 8(a), the Senate Committee on the Judiciary of the 68th Congress—1st Session, analyzed the bill on the 2nd day of February 1924, and set forth its analysis as follows:

Page 16:

"Section 8(a):—Except for the proviso, this section but repeats the provisions of Section 6 of the Act of September 16, 1916 (39 Stat. 726) the repeal of which is provided for by Section 13 of the bill. The proviso was inserted to meet exceptional cases where, without

fault of the litigant, additional time is required by him within which to present his petition."

Also on page 8:

"It provides that the period of three months from final judgment or decree, within which application for appeal, writ of error or certiorari must be made, to take the case to the Supreme Court for review, may be extended not exceeding 60 days by the justice of the Supreme Court for good cause shown."

In addition to the above comments on the bill, the review prepared by the Supreme Court further states with reference to the bill as follows:
Page 21:

"The bill has a further purpose of adding remedial provisions to existing law governing appellate procedure so that it shall not by its lack of clarity constitute a trap for the practitioner and defeat an effort to review a meritorious cause."

In the report of the Committee on the Judiciary, U. S. Senate 68th Congress, 1st Session, Report No. 362, the following appears:
Page 3:

"It may be assumed we think that no one will urge these modifications of the law on the ground that they will promote the convenience of the courts. These are brought forward solely in the interest of the people whom the courts serve, as a part of the government. They are intended to make administration of justice more certain, more uniform, more speedy, and less ex-

pensive. Considered from the standpoint of litigants alone although it is far from true that litigants only are interested in prompt and efficient administration of justice, this reform ought to be accomplished.

"First, because the Supreme Court under the present system cannot dispose of the cases brought before it with sufficient promptitude. Disregarding the cases which under the various statutes are advanced for argument, the ordinary case is not decided for 12 or 14 months after the necessary papers are filed. * * *

"Again many worthy cases fail because of the uncertainty which attends the proper mode of reaching the Supreme Court. THE METHOD OF INVOKING JUDICIAL RELIEF SHOULD BE MADE JUST AS PLAIN AS THE ENGLISH LANGUAGE CAN MAKE IT. (Writer's emphasis.) Every failure to pursue the right path which results in a refusal to consider the real point or points in controversy tends to destroy the confidence of the people in their judicial tribunals. THERE NEVER WAS A TIME WHEN DIRECTNESS OF EXPRESSION WAS MORE IMPORTANT THAN AT THE PRESENT MOMENT. (Writer's emphasis.)"

The report of the Committee on the Judiciary of the House of Representatives No. 1075, 68th Congress—2nd Session, states at page 7:

"REMEDIAL PROVISIONS

"In addition to these changes of jurisdiction there are in the proposed bill some remedial amendments of a general character.

"First:—The time for application for writ of error or appeal or certiorari to the Supreme Court has been enlarged from the present limit to three months and six months for the Philippines, by a provision for a further allowance of 60 days on order of a justice of the Supreme Court upon a proper showing.

* * * * *

"WAY OF APPEAL WILL CEASE TO BE A TRAP

"Besides the relief of the Supreme Court docket in turning aside large numbers of cases from that Court in making the decisions of the Circuit Court of Appeal to file in many cases and only reviewable by certiorari —this bill should become a law because it qualifies and makes understandable the law governing appeal whether by writ of error, appeal or certiorari.

"It was well said by the Chief Justice at the hearing that the present laws are a 'trap' in procedure. This bill will simplify the law of appellate jurisdiction, relieve lawyers and litigants of uncertainties and perils which cannot always be avoided even by the well equipped and trained practitioner."

From the above it can be seen that the intent of Congress was clear in two respects: 1) There was an intent to enlarge the time during which application for a write of certiorari could be made. 2) There was an intent to make the statute clear on its face so that a person reading the same could assume that the words would have their plain, ordinary English meaning. In the course of interpreting the above section of the act (Title 28 U. S. C. A. Sec. 350), however, this Court has read into the act a requirement that is not specifically stated on its face, to wit, that an application to extend the time to file a petition for a writ of certiorari

must be made before the expiration of the original three month period. *Finn v. Railroad Commission, supra,* and *Cresswell* v. *Tillinghast,* 286 U. S. 560, 52 Supreme Court 648.

Mr. Justice Vandervanter in a hearing before the Senate Committee on the Judiciary, 68th Congress—1st Session, stated on page 26 that one of the purposes of the bill concerned the discretionary jurisdiction which the Supreme Court exercises on petitions for certiorari and that the bill proposes a remedy of "diminishing obligatory jurisdiction and enlarging discretionary jurisdiction." (See p. 13, Committee on the Judiciary of the House of Representatives, 68th Congress, 2nd Session, hearing December 18, 1924.)

It is respectfully submitted that an application of the law as laid down in the cases of *Finn* v. *Railroad Commission, supra,* and *Cresswell* v. *Tillinghast, supra,* would be contrary to the intent of Congress to make provision to save litigants trapped by inadvertance, from losing the opportunity of petitioning for certiorari after the 90 day period expired.

The practitioner should be able to rely on the express wording of the Statute, which in this case refers to "entry of such judgment or decree' which counsel for petitioners have interpreted, perhaps incorrectly, to mean judgment on the mandate when entered in the District Court. To hold that we are outlawed by reason of this interpretation is to defeat the intent of Congress, and in fact set a trap for practitioners in direct contravention to the express meaning of the bill as set forth in Congressional hearings and contrary to the sound judicial discretion of this Court.

The petitioners relied upon the plain wording of the Act in gauging its time to petition herein. The Act makes no mention of "order for mandate or mandates", and specifically refers to only "judgment or decrees". The petitioner

does not contend that this statute should be so interpreted so as to permit an application for an extension of time at any time. The statute states that no application will be granted except for good cause shown and that the "Supreme Court or a Justice thereof" can allow additional time not exceeding sixty (60) days. The petition herein was mailed at the expiration of the time within which same should have been docketed according to strict interpretation of the statute, well within the additional sixty days allowed for extension.

If the intent of the act of February 13, 1925, is to protect litigants from just such an unfortunate occurrence, then justice dictates that the time to petition for a writ of certiorari herein be extended to permit the filing a few days late, which would be before the expiration of the time gauged upon the District Court judgments entered in accordance with the mandate, providing, of course, that this Court feels the question is of sufficient importance to be reviewed.

It may be pointed out that decisions of this Court indicate that jurisdiction over appeals cannot always be governed by strait-laced theories, but may often bow to the justice of particular situations. See *Reconstruction Finance Corp.* v. *Prudence Securities Advisory Group,* 311 U. S. 579, 61 S. Ct. 331; *Rorich* v. *Board of Commissioners,* 307 U. S. 208, 59 S. Ct. 808; *Oklahoma Gas and Electric Co.* v. *Oklahoma Packing Co.,* 292 U. S. 386, 54 S. Ct. 732; *Gully* v. *Interstate Natural Gas Co.,* 292 U. S. 16, 54 S. Ct. 565.

CONCLUSION

The petitioners respectfully pray that this petition to extend time, *nunc pro tunc,* to file a petition for certiorari to and including September 27th, 1948, be granted.

Respectfully submitted,

JOSEPH MCGOWAN
PASQUALE BURO
Petitioners

By JACOB RASSNER
Attorney for Petitioners

NATHAN BAKER
THOMAS O'ROURKE GALLAGHER
ROBERT KLONSKY
With him on the Petition.

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 311 - 312

JOSEPH McGOWAN, *Petitioner,*

v.

J. H. WINCHESTER & CO., INC.

PASQUALE BURO, *Petitioner,*

v.

AMERICAN PETROLEUM TRANSPORT CORP.,

v.

GEORGE R. TOLLEFSEN & M. A. TOLLEFSEN, COPARTNERS, DOING BUSINESS AS TOLLEFSEN BROTHERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUGGESTION THAT PETITION WAS FILED OUT OF TIME AND MOTION FOR EXTENSION OF TIME WITHIN WHICH RESPONDENTS MAY FILE BRIEF IN OPPOSITION

The attention of the Court is respectfully invited to the fact that the judgments of the Court of Appeals for the Second Circuit were entered June 24, 1948 and that the petition for a writ of certiorari was filed with the Clerk of this Court on September 27, 1948. In these circumstances it would appear that the petition was not filed within ninety days of the entry of final judgment, as required by Section 2101 (c) of Title 28 U. S. Code nor within three months of the entry of final judgment, as formerly required by Section 8(a) of the Act of February 13, 1925 (former 28 U. S. C. 350). It is suggested therefore that the petition be dismissed on this ground.

If, however, the Court concludes that the filing was timely, respondents believe that the petition does not merit review and desire to present formal opposition thereto. In those circumstances respondents respectfully request that, if the petition be deemed timely, an extension of an additional thirty days within which to file a brief in opposition be granted.

Respectfully submitted,

OCTOBER 1948

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